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THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation and maintenance of corporations, is to deal with members of the bar, exclusively.

1892--1935

On December 4, The Corporation Trust Company begins its 44th year of service to attorneys and corporations. This Company was granted its charter on December 4, 1892.

New Corporate Activity and the New Year

Each December it is the custom of many attorneys who are concerned with the organization of new corporations, or the qualification of foreign corporations in states in which they have not previously been licensed, to give special consideration to the dates on which organizations or qualifications are to be consummated. In some instances, where proposed organizations or qualifications are delayed until the new year, the corporations are relieved of the necessity of preparing elaborate income tax returns covering the few remaining days of the current year. This, in itself, is often a factor in determining the date upon which documents of organization or qualification are to to be filed.

Raymond Kenway

President.

THE CORPORATION JOURNAL

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The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for December

"Capital Stock," "Capital" and "Stated Capital"

ROBERT A. MACLEAN

Before shares without par value came into use, it was not necessary that issued "capital stock" be distinguished from the "capital" represented by the issued shares. Where all shares had par value and shares could only be issued for par, the capital represented by the issued shares was necessarily the same as their aggregate par value.

The creation of shares without par value has made it necessary to distinguish issued capital stock from the capital represented by issued shares. The need for this was apparent where, pursuant to statutory authority, a part of the consideration for the issuance of shares without par value could be allocated as paid-in surplus. A distinction was also required where, by statutory procedure, the capital could be reduced without any change in the number of issued shares without par value, a reduction which has been appropriately referred to as "a reduction of capital liability." In these instances, the amount of capital represented by the issued shares was quite different from the consideration for which they had been issued.

The capital represented by issued shares is variously referred to in the statutes of the several states as "capital," "stated capital" and "capital stock." In the Louisiana statutes, and in the statutes of other states which have since followed to a large extent the proposed "Uniform Corporation Act" drafted by the American Bar Association, such capital is referred to as "capital stock." In the statutes of Ohio, and those of several important states which follow Ohio, the term "stated capital" has been employed, because of the ambiguity which has resulted from the indiscriminate use of the term "capital stock." "Stated capital," as distinguished from authorized or issued capital stock, is clearly defined in the statutes of Illinois, as follows:

> *"Stated capital" means, at any particular time, the sum of (1) the par value of all shares then issued having a par value and (2) the consideration received by the corporation for all shares then issued without par value, except such part thereof as may have been allocated otherwise than to stated capital in a manner permitted by law, and (3) such amounts not included in clauses (1) or (2) of this paragraph as may have been transferred to the stated capital account of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus such formal reductions from said sum as may have been effected in a manner permitted by law.*

Domestic Corporations

Delaware.

Conditions required to enable stockholder to maintain suit on behalf of corporation. "A stockholder has no right to file a bill in the corporation's behalf unless he has first made demand on the corporation that it bring the suit and the demand has been answered by a refusal, or unless the circumstances are such that because of the relation of the responsible officers of the corporation to the alleged wrongs, a demand would be obviously futile or, if complied with, it is apparent that the officers are not the proper persons to conduct the litigation. The Supreme Court of this State so decided in *Sohland v. Baker,* 15 Del. Ch. 431, 141 A. 277, 58 A. L. R. 693. Several cases in this court, which it is unnecessary to cite, have held to the same effect." "The necessity of the stockholder's showing that the corporation cannot secure relief except through the gratuitous assumption by him of its championship, is what imposes upon him the requirement that appropriate allegations shall be made in his bill of facts upon which the court can see the basis on which that necessity rests. They are very material allegations. Being material to allege, they are material to prove, unless admitted; and if they are neither proved nor admitted, the bill should be dismissed even after answer has been filed and the cause has gone to final hearing." *Ainscow v. Sanitary Company of America,* 180 A. 614. Ivan Culbertson of Wilmington, for complainant. Caleb S. Layton (of Richards, Layton & Finger) of Wilmington, for receiver.

Kentucky.

Vote required for amendment increasing or decreasing capital stock. Section 553 of the Kentucky Statutes provides that a corporation may increase or decrease its capital stock by a vote of, or by the written consent of, stockholders representing "two-thirds of its capital stock."

In an action brought to determine the validity of the adoption of amendments to articles of incorporation under this section, the adoption by vote of stock representing more than two-thirds of the money paid in by the stockholders was held to conform to the requirements, the court saying: "The statute nowhere says that the consent of two-thirds of each class of capital stock is necessary to adopt an amendment to the articles of incorporation increasing or decreasing the capital stock." "The capital stock of a corporation is the amount paid in by its stockholders in money, property, or services with which it is to conduct its business and it is immaterial how the stock is classified. The money paid in for all classes of stock is used for the same purposes. The term 'capital stock,' as used in section 553 of the statutes, designates the amount of capital contributed by the stockholders for the use of the corporation." *Haggard v. Lexington Utilities Co. et al.,* 84 S. W. (2d) 84. S. S. Willis of

Ashland, for appellant. Stoll, Muir, Townsend & Park, Duncan & Duncan and W. L. Wallace, of Lexington, for appellees.

Michigan.

Disregard of the corporate entity; conditions required. Plaintiffs sold certain real estate to a corporation whose entire capital stock was owned by another corporation. The second corporation's entire stock was in turn owned by the defendant company, which was being sued on the ground that the corporate entities should be disregarded and the defendant company treated as the vendee under the contract. Defendants appealed from an adverse ruling. The following observation was made by the court concerning the conditions required to exist in order to enable plaintiffs to prevail: "Before the corporate entity may be properly disregarded and the parent corporation held liable for the acts of its subsidiary, I believe it must be shown not only that undue domination and control was exercised by the parent corporation over the subsidiary, but also that this control was exercised in such a manner as to defraud and wrong the complainant, and that unjust loss or injury will be suffered by the complainant as the result of such domination unless the parent corporation be held liable." The court failed to find control exercised by defendant company over the company with which plaintiffs had contracted in such a manner as to defraud or wrong them or to reveal a domination which was in any way injurious to the plaintiffs, and the decree in favor of the plaintiffs was therefore reversed. *Gledhill et al. v. Fisher & Co. et al.*, 262 N. W. 371. Monaghan, Crowley, Reilley & Kellogg of Detroit (Peter J. Monaghan and O. Regis McGuirk, of Detroit, of counsel), for appellants. H. R. Martin of Detroit, for appellees.

New York.

Inspection of stock books. Appellant, who was the founder of the debtor corporation, which was in process of reorganization under section 77B of the Bankruptcy Act, was also its president, a director and its largest stockholder. His application for an order permitting him to inspect the debtor company's stock book in order to obtain a list of stockholders had been denied by the District Court. This was held to be error. "Both by statute of New York and common law, a stockholder has the right to examine the stock book of his corporation where such examination is sought for a valid purpose. This right exists when the corporation is in bankruptcy. The appellant, as president and director of the debtor, had the right to examine the stock book of the corporation." It was also observed that the portion of section 77B providing that a judge "may" direct the debtor, or the trustees, to prepare a list of stockholders, open to the inspection of any creditor or stockholder of the debtor or to the trustee or trustees, if appointed, did not provide a limitation upon the common law and statutory right to examine the books. "The

natural and obvious meaning is that the statute gives the judge the power to deny the right to inspect upon circumstances which call forth the exercise of such discretionary refusal. The use of the word 'may' indicates that the judge is given the power, but not the absolute duty, to permit inspection, and though that power would ordinarily be exercised, it seems to be contemplated by the statute that the judge may refuse to exercise it where its exertion would, for one reason or another, be detrimental or harmful to the process of reorganization. Such is not the case here. The district judge erred in denying the appellant's application for inspection, for no proper ground was shown for the exercise of such power." *In re Bush Terminal Co.*, 78 Fed. (2d) 662. Lowell M. Birrell (William H. Button and Charles A. Van Patten, of counsel) of New York City, for appellant Bush. Root, Clark, Buckner & Ballantine (John M. Harlan, of counsel) of New York City, for trustees.

Foreign Corporations

Colorado.

Unqualified foreign insurance company, soliciting business by radio, held doing business. The petitioner, an unqualified foreign insurance company, seeks to have service of process upon it set aside. Its activities in Colorado consisted of broadcasting advertising programs over a Colorado station, payment for these facilities to the radio company being one-third of all premiums paid during the first year by policyholders obtained in this manner. Policies were to be effective upon receipt at the principal office of the insurance company in Des Moines, Iowa, of the first premium payment. A claim was made by a beneficiary under a policy solicited in this way and, upon refusal of payments by the petitioner company, it employed the Lake Service Bureau of St. Louis, Mo., which was engaged in the general business of adjusting such claims, to endeavor to make an adjustment. An employe of this Bureau was sent to Colorado with full authority to negotiate for settlement. The claimant refused to accept any settlement and instituted an action to enforce his demands. Service of summons in this action was made upon the employe of the Lake Service Bureau as the agent of petitioner insurance company in Colorado, which it seeks to have set aside. The court said of the insurance company: "Its method of attracting the attention of the public was perhaps unique and assuredly modern. Its instruments to the desired end were of and in Colorado. It chose to ignore our statutes providing how foreign life insurance companies may do business in this state; but it proceeded, nevertheless, in manner not essentially different from companies operating within the law, to obtain business from Colorado residents. The whole record considered, we are disposed to the view that petitioner was doing business in Colorado." Concerning the validity of the service of process upon the Service Bureau's employe as agent of petitioner, it was observed that he was within the jurisdiction of the court when served, that he was clothed with

broad powers and that no executive officer of petitioner could have exercised greater authority in the particular matter than that with which he was invested. "It would appear, therefore, that the service of summons on him conformed to subdivision 9, Section 40, Code Civil Procedure (C. L. 1921) which provides that service may be upon 'any agent' of a foreign corporation doing business in the state." *Union Mutual Life Co. of Iowa v. District Court of City and County of Denver et al.*, 47 P. (2d) 401. Grant, Ellis, Shafroth & Toll of Denver, for petitioner. William E. Hutton and Bruce B. McCay of Denver, for respondents.

Louisiana.

Maintenance of suit against a foreign corporation in Louisiana barred where cause of action did not arise in that state. Defendant Delaware company was sued by plaintiff, a Texas corporation, in a Louisiana court upon a cause of action which arose in Texas and was in no way connected with defendant's activities in Louisiana. When defendant had qualified in Louisiana, it had appointed an agent upon whom service of process might be made. The statute authorizing such appointment and service also provided that "the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation growing out of or connected with the business done by said corporation in this state." The lower court had sustained defendant's contention that the court had no jurisdiction over this cause of action arising in another state. This was also the view of the Louisiana Supreme Court, which said: "It is clear, we think, that by the adoption of this act the Legislature did not intend to vest in the courts of this state jurisdiction over foreign corporations admitted to do business here, in causes of action arising outside of the state, and not growing out of or connected with any business done by the corporation in this state." *Staley-Wynne Oil Corporation v. Loring Oil Co.*, 162 So. 756. Chandler & Chandler of Shreveport, for appellant. Fraser & Carroll of Many, for appellee.

New York.

Section 71, Stock Corporation Law, relating to "liabilities of stockholders to laborers, servants or employees" construed by the Court of Appeals as to foreign corporations. The following question was answered ***in the negative*** by the Court of Appeals of New York on October 22, 1935, in the case of *Armstrong v. Hobby et al.*, all judges concurring, there being no written opinion:

> "Does Section 71 of the Stock Corporation Law apply to stockholders of a foreign corporation and to its employee other than a contractor, in a situation (a) where the foreign corporation was doing business in New York (b) where the services of the employee were rendered in New York, and (c) where the contract of employment was entered into in New York?"

This answer, it should be observed, is contrary to the holding

of the Municipal Court of the City of New York, Borough of Manhattan, Fourth District, in the case of *Spector v. Brandriss*, 259 N. Y. S. 558, (The Corporation Journal, January, 1933, page 299) and to the conclusion reached by the New York Supreme Court, Appellate Term, First Department, in *Greenberg v. Rosenwasser et al.*, 264 N. Y. S. 529, (The Corporation Journal, October, 1933, page 16.) Peaslee & Brigham of New York City, for appellant Armstrong. Berger & Landes of New York City, for respondents.

Right of foreign corporation to maintain action in state courts. Section 181 of the Tax Law denies to an unqualified foreign corporation the right to maintain an action or to recover in any of the state courts if it is delinquent in the payment of its license fee. The claimant, a foreign corporation, unqualified and delinquent, had presented its claim in an accounting proceeding in the Surrogate's Court, New York County, which had been disallowed because of its failure to comply with Section 181. Thereupon, compliance with Section 181 was effected and application was made to reopen the accounting proceedings that the claim which had been disallowed might be established. This was denied, the court remarking that it is only by payment of the tax that a foreign corporation becomes entitled to enforce its rights in the courts of the state and further, that the right, if it exists at all, must exist at the time the action is initiated. It was therefore held that notwithstanding the subsequent compliance with the law, the corporation could not now enforce a claim which, prior to such compliance, it had no right to establish. *In re Scheftel's Estate*,* 281 N. Y. S. 957, 156 Misc. 443. Andrew A. Fraser (Blaine F. Sturgis, of counsel), of New York City, for executors. Patterson, Eagle, Greenough & Day (Carroll G. Walter and James Lee Kauffman, of counsel), of New York City, for claimant. Lewis E. Sisson of New York City, special guardian for infant.

* The full text of this opinion is printed in **The Corporation Tax Service**, New York volume, page 514.

Pennsylvania.

Writ of mandamus to compel the qualification of foreign nonprofit corporation denied. The petitioner, in his capacity as treasurer of a Delaware corporation, Keystone State Moving Picture Operators' Association, sought to obtain a writ of mandamus commanding the Secretary of the Commonwealth of Pennsylvania to qualify the corporation under the Nonprofit Corporation Law of 1933 and to issue a certificate of authority to it. The petition for the writ of mandamus was dismissed for several reasons, among which were: (1) the petitioner failed to show that he was personally beneficially interested in the result of the action sought to be accomplished; (2) the Nonprofit Corporation Law prohibited the issuance of a certificate of authority to a foreign nonprofit corporation if the application sets forth any kind of business for which a domestic nonprofit corporation could not be formed, and petitioner's com-

pany's application offended in this respect; (3) the name of the company could not be used under the statute, as it was "deceptively similar" to the name of a domestic corporation previously registered and authorized to do business in Pennsylvania, which had intervened in this action; and (4) the use of the word "State" as a part of the corporate title was forbidden by section 202 of the Act. *Benjamin Horowitz v. Richard J. Beamish, Secretary of the Commonwealth,* 40 Dauphin County Reports 336. Metzger & Wickersham, for the plaintiff. S. M. R. O'Hara, Deputy Attorney General, and William A. Schnader, Attorney General, for the defendant. Solomon Hurwitz for the intervener.

South Dakota.

Foreign corporation's acceptance in another state of assignment of conditional sale contract made within South Dakota held not to be doing business. Appellant foreign corporation's right to maintain its suit had been successfully challenged by the defendant in the lower court on the ground that appellant was an unqualified foreign corporation whose contracts, under the statutes, were void as to it, by reason of its failure to qualify to do business. There had been a sale of an automobile within the state under a conditional sale contract, duly recorded. The seller had assigned the contract to appellant and mailed it to the appellant in another state, where the appellant bought the contract and sent the seller of the car the money. The question was whether the appellant was doing business within the state in which the automobile had been sold or whether it was engaged in interstate commerce. The court remarked: "It cannot be said from the record before us that the appellant's transactions with South Dakota residents amounted to concluding business transactions within the state." "Respondent contends that the appellant was not engaged in interstate commerce because of the fact that notes and contracts per se are incapable of becoming articles of interstate commerce. We are not impressed with that contention as being a sound rule of law * * *. The law seems to be quite well settled and established that stocks and bonds are proper subjects of interstate commerce and that the transaction of such articles of personal property from one state to another for the purpose of barter and sale and delivery constitutes not only commerce among the states of this country, but constitutes a very large and important element of such commerce." Appellant's transactions were held to be interstate transactions and the ruling of the lower court denying maintenance of the suit was reversed. *General Motors Acceptance Corporation v. Huron Finance Corporation et al.,** 262 N. W. 195. Stinchfield, Mackall, Crounse, McNally & Moore of Minneapolis, Minn., and Churchill & Benson of Huron, for appellant. Longstaff & Gardner of Huron, for respondent.

* The full text of this opinion is printed in **The Corporation Tax Service, South Dakota volume, page 132.**

Congress Is C

The second session of the 74th Congress will find, as it m Ja left over from the last session, a few of which are shown b y. S import. In addition, new measures are almost certain to be prop For attorneys whose welfare is affected, general day-to-day newspaper tche with these measures will not be enough. For such men The Corp olicit ration Trust Company's Congressional Service is essential. It permi curem a study of the text of the various bills introduced, close watchfuln fore of the contents and purposes of all amendments offered to them, prom H. information on the actions of the committees considering them and ea viding knowledge of every step taken. Learn now—write or telephone the of Federa nearest you—how this service will cover any particular subject of importance to you, and how moderate its cost is.

AGRICULTURE:

H. R. 6772 — Designed to insure fair practice and honest dealings on the commodity exchanges.

H. R. 7593 — Facilitating extension of agricultural credit at lower interest rates by providing for issue of certain bank notes.

H. R. 8495—Plant Quaranune Laws — the purpose of this legislation is to render more effective the quarantine laws of those States which maintain quarantine-inspection service.

H. R. 2066 and S-212—Refinancing of farm mortgages. Designed to refinance existing farm mortgages at low rates of interest over a long amortization period.

H. R. 6424 — Continuation of Cotton Control Act by providing for better administration.

AIR NAVIGATION:

S-3420—To regulate passengers and property by aircraft in interstate and foreign commerce.

BANKRUPTCY:

S-84 — Amending Bankruptcy Statutes relating to depositories for money of bankrupt estates.

H. R. 5452 and S-2416—Amend Bankruptcy Statutes with respect to farm debtors. Designed to clarify Sec. 75 so that decisions and interpretations and constructions that U. S. district courts have, and may hereafter make, may become and be uniform.

H. R. 8940 — Corporate reorganizations —percentage of indebtedness necessary to be held by creditor to place corporation in reorganization.

H. R. 6982 — Municipal Bankruptcy Act — proposing an amendment thereto affecting drainage, levee, irrigation and reclamation districts.

COMMERCE AND NAVIGATION:

H. R. 8597 — Seamen's legislation — designed to insure greater certainty in procuring able seamen for service in American merchant marine.

H. R. 8555—Provide for development of a strong American merchant marine to promote the commerce of the U. S.

H. R. 5292 — To provide for the measurement of vessels using the Panama Canal.

COMPOSITION OF U. S. NAVY:

H. R. 5730—Amend Sec. 3b of Act of March 27, 1934, establishing composition of Navy with respect to catagories of vessels limited by treaties, etc. Amendment proposes four changes in respect of excess profits taxes.

CONSTITUTION OF U. S.:

H. R. 8368—To enforce the 21st Amendment, guaranteeing Federal protection to "dry" States against liquor-law violations directed from outside their borders.

COPYRIGHTS:

S-3047 — Important amendments to Copyright Act of 1909.

FRAUDS:

H. R. 4454 — Provide a 10-year period of limitation on pr cutions by co martial for offe involving fra against the U. S.

FOREIGN TRAD

S-3393 — Creati Federal Board of eign Trade.

GOVERNMENT CONTRACTS:

H. R. 7293—Am Act of June 16, 19 providing relief Government cont tors. This amendm permits adjustment claims of subcont tors on same basi those of contracto

S-3055 — Provi conditions for chase of supplies making of contr loans, or grants U. S.

IMMIGRATI AND NATURA ZATION:

H. R. 4900—Am Naturalization law respect to resid requirements.

JUDICIARY:

S-1277 — Auth ing persons, f corporations, as tions or societies file bills of in pleader.

H. R. 8180 — P hibit use of mails

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January 3, 1936, many bills
. Some of these are of vital
For the business men and their
tches on what Congress is doing

olicitation of the pro-
urement of divorces
n foreign countries.

H. R. 7680 — Pro-
iding punishment for
illing or assaulting
Federal officers.

S-3097—Relating to
nterest and usury af-
ecting parties under
urisdiction of U. S.
Courts where the
U. S. exercises extra-
erritorial jurisdiction.

S-395 — Relative
o qualifications of
awyers in the District
f Columbia.

LABOR:

H. R. 7198 and S-87
—Prevent shipment in
nterstate commerce of
rticles and commodi-
es in connection
ith which persons
re employed more
han 5 days per week
r six hours per day.

H. R. 6450—Provide
or equal representa-
ion on Government
odes and boards.

H. J. Res. 146—In-
erstate compacts to
romote uniform State
egislation affecting
abor and industries.

LOBBYISTS:

S-2512 — Providing
or registration of lob-
yists.

**ONGSHORE-
EN'S AND HAR-
OR WORKERS'
CT:**

H. R. 8293 and
-2791 — Proposing
ertain amendments to
e Act for its better
dministration.

**OTOR
EHICLES:**

Providing for the
miannual inspection
of all motor vehicles in the District of Columbia.

NATIONAL ELECTIONS:

S-2134—To prohibit employers from influencing the vote of their employees in national elections.

OIL AND PETROLEUM:

H. R. 8289—Amending the Oil and Gas Leasing Act of 1920 with respect to issuance of prospecting permits.

H. R. 9053—Regulate interstate and foreign commerce in petroleum and its products.

PATENTS:

H. R. 4985—Permitting single signature in patent applications and validating joint patent for sole invention.

POSTAL SERVICE:

S-1226—To prohibit the sending of unsolicited merchandise through the mails.

PROFITEERING IN TIME OF WAR:

H. R. 5529 — Designed to prevent profiteering in time of war.

PURE FOODS AND DRUGS:

S-5—Copeland Pure Food and Drug bill —proposing administration sponsored amendments to Food and Drug Act.

RAILROADS:

H. J. Res. 314—Appointment of a commission to investigate desirability of further retirement and annuity legislation applicable to interstate carriers by railroad.

RECONSTRUCTION FINANCE CORPORATION:

H. R. 8279 — Authorizing R. F. C. to make loans to institutions organized for purpose of making loans for payment of real estate taxes.

REVENUE AND TAXATION:

H. R. 191—Amending 1918 Revenue Act by reducing the rates of tax on all forms and kinds of wine by one-half.

H. R. 9185 — Internal - revenue taxation of distilled spirits, wines and beverages.

TRADE IN ARMS AND IMPLEMENTS OF WAR:

H. R. 8788 and S-2998 — To control trade in arms, ammunition and implements of war by setting up of administrative machinery to enable Federal Government to supervise and control manufacture and international traffic.

UNEMPLOYMENT INSURANCE:

H. R. 2827 — Provides for establishment of system of social insurance to compensate all workers and farmers over 18 years of age in all industries, occupations and professions, who are unemployed through no fault of their own.

WATER CARRIERS:

S-1632—Regulation of water carriers operating in interstate and foreign commerce.

WEIGHTS AND MEASURES:

H. R. 8631 — Providing for use of net weights in interstate and foreign commerce transactions in cotton.

Texas.

Foreign corporation maintaining office in state must show issuance of permit. In an action brought by the Texas Bitulithic Company, a foreign corporation, the Court of Civil Appeals of Texas (El Paso), on rehearing, says that while it is true that, unless the petition shows that the corporation is doing business in Texas, the fact must be specially pleaded to place upon the corporation the burden of proof as to a permit, yet it is equally true, that, where the petition shows that the corporation has an office in the state, it likewise has the burden of showing the issuance of a permit. The petition in the present case showing the existence of an office in Texas, the burden was on the Bitulithic Company to prove that it had been granted a permit to do business in Texas. The former holding that it was not necessary for the company to prove it had a permit to do business in Texas, was accordingly withdrawn. *Feder et al., v. Texas Bitulithic Co. et al.*, 82 S. W. (2d) 724. Harrison, Scott & Rasberry, of El Paso, for plaintiffs in error. Fred C. Knollenberg and Fulton C. Vowell, both of El Paso, for defendants in error.

Taxation

California.

A state, in imposing a franchise tax measured by income for the privilege of doing business in the state, may include income from interstate commerce as a measure of the tax. Petitioners were domestic corporations engaged in both intrastate and interstate or foreign commerce, who contended that the state might not properly apply the franchise tax based on income to income other than that derived from intrastate commerce. The state, however, in addition to applying the tax to intrastate income, had based the tax upon the proportion of the total net income, both intrastate and interstate or foreign, according to the portion of income from business done within and without the state which the amount of business originating in California bore to the total business done. This method is held not to be improper. The court said that it was well settled that any tax that is a direct burden on interstate commerce is unconstitutional. Thus, a franchise tax measured by net income cannot be imposed on a foreign corporation engaged solely in interstate commerce, because such tax attempts to directly burden such commerce. "On the other hand, it has been held that a tax upon net income of a foreign or domestic corporation engaged in both interstate and intrastate commerce, where the tax is imposed upon all income earned within the state, including income derived from transactions in interstate or foreign commerce, does not amount to burdening interstate or foreign commerce, and is valid." "When a foreign corporation comes into this state and does some intrastate business, as well as interstate business originating here, it cannot be taxed for the privilege of engaging in interstate commerce, but it may be

taxed for the privilege of engaging in intrastate commerce. In fixing that tax, the state may require the corporation to pay for that privilege a tax measured by its net income attributable to business done in this state, regardless of whether the income is derived from intrastate business or from interstate or foreign commerce." "Since, under the Federal Constitution, the state may impose a franchise tax, measured by income from business done within the state derived from interstate or intrastate commerce, upon foreign corporations doing some intrastate business, it likewise has at least equal powers as to domestic corporations." *Matson Navigation Company et al. v. State Board of Equalization of California et al.,** 43 P. (2d) 805. Brobeck, Phleger & Harrison of San Francisco, for petitioners. U. S. Webb, Attorney General, H. H. Linney, Deputy Attorney General, and Dixwell L. Pierce and Frank M. Keesling, of Sacramento, for respondents. **(Probable jurisdiction noted by United States Supreme Court, October 14, 1935.)**

* The full text of this opinion is printed in **The Corporation Tax Service**, California volume, page 281-43.

Maryland.

Gross Receipts Tax held constitutional. Appellant retail merchants instituted these suits to test the constitutionality of Chapter 188 of 1935 imposing an emergency gross receipts tax. Among objections offered to the validity of the tax were the use in the law of "gross sales" and "gross receipts" interchangeably, involving an alleged insufficiency in the title of the act, a contention that the one per cent rate was excessive and the partial exemption of motor vehicle dealers as an unreasonable discrimination. The Court of Appeals, in holding the tax constitutional, said that the tax was one measured by receipts. "The act specifically declares it to be such, and the references to sales or reports of sales as the basis of the assessment in the provisions of what may be described as the machinery of enforcement, however inapt the words may be considered, could not overcome this specific description. We must suppose the assembly to have been aware of the words it was using, and to have regarded them as adequate for imposition of the tax defined, a tax measured by the receipts, and must construe the sections to make them work accordingly, so far as that is possible." Answering the contention that the tax was invalid because of the resulting hardships on many merchants, the court remarked that similar taxes are levied in other states at rates of 2 per cent., 2½ per cent., and 3 per cent. of the receipts from sales. "It would hardly be possible for this court, contradicting the Legislature, if it had the right to do so, to adjudge the tax of 1 per cent. to be excessive in amount." "It is only when a license fee is exacted as a police regulation that the court can consider whether it is so unreasonable as to amount to a prohibition." With reference to the partial exemption of motor vehicle dealers, it was observed: "We cannot say with assurance

that the easy mobility of motor vehicles and the competition with dealers in other jurisdictions do not, as argued, require special separate treatment of the dealers. Such possibilities would prevent the court's concluding that the partial exemption of motor vehicle dealers constitutes an unreasonable discrimination." *Jones et al. v. Gordy, Comptroller; Lechert v. Gordy, Comptroller,** 180 A. 272. Randolph Barton, Jr., and Morris Rosenberg, of Baltimore (Allan Sauerwein, Barton, Wilmer, Ambler & Barton, and Tydings, Sauerwein, Levy and Archer, all of Baltimore, on the brief) for appellants. Herbert R. O'Conor, Asst. Atty. General, (Hilary W. Gans, Deputy Atty. General, on the brief), for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service, Maryland volume, page 7597.**

Ohio.

The retail sales tax is held constitutional as to certain vendors. Plaintiff, the president of a farmers' cooperative marketing corporation, owning and operating a market place in Akron at which the members sold farm products produced upon their farms directly to consumers and retailers, brought this action in his own behalf and on behalf of others similarly situated, to enjoin the Tax Commission of Ohio from compelling them to collect the tax from purchasers of goods sold by them on the general ground that the act imposing the tax (Laws, 2d Special Session, 1933-1934, House Bill No. 134) is unconstitutional.

The Court of Appeals, Ninth Judicial Circuit of Ohio points out that "the power of the state to tax the *consumer* is not involved in this action, nor is there involved the validity of the parts of the act which affect the rights of the consumer only, and therefore plaintiff, as a vendor, cannot be heard to claim that Sec. 2 of Art. XII of the constitution of Ohio, which limits the power to tax property in excess of 1% of its true value in money, has been violated, even if the tax against the consumer is a property tax, and not, as it is declared by the act to be, an excise tax; but if that question were involved, we are of the opinion that the instant tax is a tax on the right to acquire property by purchase for use or consumption, and is therefore an excise tax, which is authorized by Sec. 10 of Art. XII of the constitution of Ohio." "The constitution of the United States forbids the enforcing of a law which abridges the privileges or immunities of citizens or deprives any person of his property rights without due process of law, and by the constitution of Ohio a citizen has an inalienable right to acquire and sell property and hold the same inviolate, subject only to the public welfare, and an inalienable right to seek and obtain happiness and safety; and it is claimed that the act in question violates these and other constitutional provisions." "We hold that the requirements that, as conditions to the exercise by plaintiff of his right to sell the produce of his farm other than on his farm, he obtain a license, collect the tax on sales made by him to consumers, and secure the payment of

the same to the state by the purchase of tax receipts, are not unreasonable regulations of his enjoyment of the aforementioned rights guaranteed to him by said constitutions; and speaking generally as to other claims of plaintiff, we do not find that any of his rights growing out of the agreed facts or incidental thereto are so regulated or injuriously affected by any of the provisions of said act as to violate any of the provisions of said constitutions." *Fox v. Frank et al.*,* Court of Appeals, Ninth Judicial District, decided October 23, 1935. Commerce Clearing House Court Decisions Reporting Service Requisition No. 144978.

* The full text of this opinion is printed in **The Corporation Tax Service**, Ohio volume, page 503-14.

Pennsylvania.

A co-operative association making sales to non-members is subject to the mercantile license tax. This was an appeal from a judgment sustaining a mercantile license tax assessment against the appellant co-operative agricultural association, which bought merchandise which it sold to both its members and to non-members. The association contends that, as it is not permitted under the statute creating it to engage in business for profit, it is not to be regarded as a dealer within the meaning of the mercantile license tax provisions. "The practice of buying to sell again," said the court, "is what constitutes one a dealer and not the intent to make a profit. Whether the appellant is subject to the tax does not depend upon whether it seeks, or has the legal right, to make a profit from its transactions, but whether it buys to sell again." This the association admittedly did on behalf of non-members and it was, therefore, held to be exercising the privilege which was taxed. *Appeal of Beaver County Co-operative Association*,* 180 A. 98. Joseph Knox Stone of Beaver, for appellant. Charles J. Margiotti, Attorney General, E. Russell Shockley, Deputy Attorney General, and Homer H. Swaney of Beaver Falls, for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service**, Pennsylvania volume, page 597-96.

Washington.

The Washington Sales Tax is held constitutional; use of tokens; collection of tax by retailer; exemptions. This action was brought by the plaintiff, who conducted a restaurant business in Seattle, to restrain the members of the State Tax Commission from enforcing the provisions of Title III, Chapter 180, Laws of 1935, levying a sales tax, appellant contending that the tax was a direct property tax, lacking uniformity in its application and that it was therefore in violation of the Federal and State Constitutions, while respondents said it was not a direct levy upon property but was an excise, not controlled by the provisions of the Federal and State Constitutions.

The court, after comparing this tax with the Arkansas sales tax, held constitutional in *Wiseman v. Phillips*, 84 S. W. (2d) 91, and the Kentucky gross sales tax, held unconstitutional in *Stewart Dry Goods Co. v. Lewis*, 55 S. Ct. 525, reached the conclusion that the Washington sales tax "is an excise, not required to be apportioned," and, therefore, not obnoxious to the provisions of the State and Federal Constitutions.

Objection was made by the appellant to the enforcement of provisions of the sales tax law authorizing the use of tokens, in payment of the tax on small purchases as violating Article 1, Section 10, of the Federal Constitution. To this the court replied: "We are unable to see how the appellant is in any way injured by their use. The limitation upon the power of the states to coin money or emit bills of credit is a reservation in favor of the federal government, and until it sees fit to question the state's use of tokens, it would seem that the appellant can have no cause to complain."

The law made the buyer subject to the tax and the seller was required to collect the tax from the buyer and remit to the state. The appellant, as a retailer, objected to this arrangement as imposing the burden of an uncompensated service upon him, but it was held to be within the legitimate power of the Legislature to impose the duty of collecting upon the retailer as a reasonable regulation of his business.

The exemption of casual and isolated sales and of sales of milk, raw fruits, vegetables, butter, eggs, cheese and bread were held not to be discriminatory and within the wide discretion conceded to the legislature in classifying for the purpose of excise taxation. *Morrow v. Henneford et al.*,* 47 P. (2d) 1016. Little & Collett, Robert W. Reid and Robert L. Flanders, of Seattle, for appellant. G. W. Hamilton, W. A. Toner and R. G. Sharpe, of Olympia, for respondents. **(Petition for a rehearing was denied October 9, 1935.)**

* The full text of this opinion is printed in **The Corporation Tax Service. Washington volume, page 7211.**

Wisconsin.

Emergency occupational tax on chain stores held unconstitutional. The plaintiffs, having paid a tax, under protest, imposed by Wisconsin Statutes, 1933, Section 76.75, brought this action to recover the amount paid. That section provided for an occupational tax on chain stores, requiring the operators of two or more stores to pay an annual tax on the gross income derived from their retail operations in Wisconsin. The rate of tax varied according to the amount of gross income, ranging from six-twentieths of 1 per cent. upon gross income of $100,000 or less, to thirteen-twentieths of 1 per cent. upon all gross income in excess of $5,000,000.

The court referred to the similarity between this statute and a Kentucky statute, (Acts 1930, Chapter 149), which had been held unconstitutional by the United States Supreme Court, March 11,

1935, in *Stewart Dry Goods Co. v. Lewis,* 55 S. Ct. 525, (Corporation Journal, Vol. XI, page 423), and while finding differences in the rates specified, it observed that they were substantially the same in legal effect in the manner in which the rates were graduated and increased as the gross sales increased in amount progressively from the specified limitations of one bracket to the limitations of the next. The fact that the Wisconsin tax applied to those operating two or more stores, while the Kentucky statute had been made applicable to the operators of one or more stores, was held not to present a material distinction. Following the reasoning in the *Stewart Dry Goods Co.* case, the court found the Wisconsin tax "unduly discriminatory as between those who were to be taxed," and that "there is no constant or reasonable relation between gross income and the size, in so far as the number of stores is concerned, of an integrated chain, or between its gross income and its ability to pay a tax imposed at rates increased progressively for the higher brackets of its gross income, and that consequently there is no reasonable relation between such graduations in the rate of taxation and the actual relative value to the parties taxed of the privilege which is enjoyed by each of them as an operator of a chain store." "Because of the absence of that essential reasonable relation in the respects stated, the tax imposed under Section 76.75(3), Stats., is arbitrary and discriminatory, under the decision in the *Stewart* case, and therefore Section 76.75 Stats., is in violation of the Fourteenth Amendment, U. S. Const., and void." *Ed. Schuster & Co., Inc. v. Henry, State Treasurer; Wadhams Oil Co. v. Henry, State Treasurer,** 261 N. W. 20; decided June 4, 1935. Kaumheimer & Kaumheimer of Milwaukee (Edward J. Dempsey of Oshkosh; Bowler, Bowler & Currie of Sheboygan, and George H. Likert, Jr. of Milwaukee, of counsel) for appellant Ed. Schuster & Co. Nichols, Morrill, Wood, Marx & Ginter of Cincinnati, Ohio, amici curiae. Fish, Marshutz & Hoffman of Milwaukee (I. A. Fish, J. H. Marshutz and W. H. Voss of Milwaukee, of counsel) for appellant Wadhams Oil Co. Olin & Butler of Madison, amici curiae. James E. Finnegan, Atty. Gen. and Cyrus C. Thieme, Sp. Counsel, of South Milwaukee, for respondent. *(Note: A petition for a writ of certiorari was denied by the United States Supreme Court on October 21, 1935.)*

(Section 76.75 which was held void in the above case was repealed and re-enacted by Laws of 1935, Chapter 545, effective October 4, 1935. As re-enacted, the section provides for an occupational tax on those engaged in the chain store business in Wisconsin at rates from $25 for each "sales outlet" in excess of one but not in excess of five to $250 for each "sales outlet" in excess of twenty-five.)

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*The full text of this opinion is printed in **The Corporation Tax Service**, Wisconsin volume, page 6101.

The New State "Compensating Taxes"

In connection with the new taxes of the "compensating" type imposed by California, Oklahoma and Washington, outlined on page 5 of The Corporation Journal for October, 1935, it may be of interest to mention that the United States Supreme Court on May 31, 1932, held constitutional a license tax imposed by the State of South Carolina upon those who import into that state "from any other state or foreign Country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State," at the rate of "six cents per gallon for every gallon of gasoline, or other like products of petroleum aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce be kept in storage in this State to be used and consumed in this State by any person, firm or corporation, municipality, * * * and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by acts of the General Assembly of the State of South Carolina, the same being Act No. 34, Acts of 1925, approved the 23rd day of March, 1925, and Act No. 102, Acts of 1929, approved the 16th day of March, 1929, imposing license taxes for the privilege of dealing in gasoline or other like products or petroleum." *Gregg Dyeing Co. v. Query et al.*,* 286 U. S. 472, 52 Sup. Ct. 631. James M. Lynch (P. F. Henderson, Shepard K. Nash and B. A. Morgan, on the brief) for appellants. John M. Daniel, Attorney General of South Carolina (J. Fraser Lyon, on the brief) for appellees.

* The full text of this opinion is printed in **The Corporation Tax Service**, South Carolina volume, page 4008.

CORPORATE MEETINGS HELD

During the past few weeks meetings of the corporations named below, among many others, have been held at the offices of The Corporation Trust Company.

Coal Sales Company
Thorndale Corporation
Atwater Kent Company
The Lehman Corporation
Detroit Bridge Corporation
Cinema Credits Corporation
The Egyptian Lacquer Mfg. Co.
Milton Corporation
Oils & Industries, Inc.
Argonne Oil Company
Fundamental Investors, Inc.
United Founders Corporation
B. H. Howell, Son & Company
Fred Thomson Productions, Inc.
The Western Pacific Railroad Corporation
Anderson-Clayton Securities Corporation
Panhandle Producing & Refining Company

Some Important Matters for December and January

This calendar does not purport to cover general taxes or reports to other than state officials, or those we have been officially advised are not required to be filed. *The State Report and Tax Notification Service* maintained by *The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters requiring attention from time to time, furnishing information regarding forms, practices and rulings.

ALABAMA—Annual Application Fee for permit to do business due on or before February 1.—Domestic and Foreign Corporations.

ALASKA—Annual Corporation Tax due on or before January 1.—Domestic and Foreign Corporations.

CALIFORNIA—Quarterly Retail Sales Tax Return and Payment due on or before January 15.—Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January.—Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report published and filed between January 1 and January 20.—Domestic Corporations.

GEORGIA—Annual License Tax Report due on or before January 1.—Domestic and Foreign Corporations.

ILLINOIS—Annual Report due between January 15 and February 29.—Domestic and Foreign Corporations.

INDIANA—Quarterly Gross Income Tax Return and Payment due on or before January 15.—Domestic and Foreign Corporations.

IOWA—Quarterly Retail Sales Tax Return and Payment due on or before January 20.—Domestic and Foreign Corporations.

KENTUCKY—Annual Report due on or before February 1.—Domestic and Foreign Corporations.

LOUISIANA—Annual Report due on or before February 1.—Domestic Corporations.

NEW JERSEY—Annual Franchise Tax Report due on or before first Tuesday in February.—Domestic Corporations.

NEW YORK—Annual Franchise Tax based on Income of Business Corporations due on or before January 1.—Domestic and Foreign Business Corporations other than realty and holding companies.

OHIO—Report to Industrial Commission due during January.—Domestic and Foreign Corporations.

SOUTH CAROLINA—Annual Statement due on or before January 31.—Foreign Corporations.

UNITED STATES—Fourth Instalment of Income Tax imposed for the calendar year 1934 due on or before December 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.

WEST VIRGINIA—Quarterly Gross Income and Sales Tax Return and Payment due on or before January 30.—Domestic and Foreign Corporations.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplemental pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

A Corporation's Achilles Heel. Containing the complete text of the opinion of the Supreme Court of the United States in State of Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, State of Washington, and of the Supreme Court of New Mexico in Silva v. Crombie & Co. —two decisions of great significance to attorneys of corporations qualified in one or more states.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages, for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation, completely revised to reflect the changes made by the amendments of 1935.

New Deal Laws of Importance to Corporations. Contains complete text of Securities Act of 1933 as amended by Title II of the Securities Exchange Act of 1934, all matters in the original act omitted in the 1934 amendments being set in brackets, and all new matters added by the 1934 amendments being set in italics; complete text of the Securities Exchange Act of 1934; and complete text of the amendments approved June 7, 1934 to the Bankruptcy Act providing for corporate reorganizations.

The New Bankruptcy Law. Contains, first, the eleven-word amendment approved June 18, 1934 to the original amendment to the Bankruptcy Act approved June 7, 1934 (and published in our pamphlet New Deal Laws described above); second, two examples of voluntary petitions for reorganization under the new provisions; and third, two examples of petitions under the new provisions for appointment of trustees (reorganization sought).

The High Cost of Whistles for Corporations. Benjamin Franklin's classic, "The Whistle," here is shown, by the decisions in actual court cases, to have a very pointed application to some of the policies of some business corporations of our own day. A sixteen-page pamphlet for both laymen and lawyers.

Special Report. The Case Against Corporate Representation by Business Employes. Specific experiences of different corporations with the handling by untrained corporate representatives of such matters as service of process, notices of taxes due, filing of corporation reports, etc.

What Constitutes Doing Business. (Revised to April 15, 1934.) A 198-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index makes them accessible also by either case name or topic. There is also a section containing citations to cases on the question of doing business such as to make the company subject to service of process in the state.

Amateur Corporate Representation. A booklet dealing with some of the weaknesses of placing a company's statutory representation in the hands of business employes or others not trained in the matters involved.

When Corporations Cross the Line. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

Questionnaire on Business Outside State of Organization. This is a Form for attorney's use in determining when a corporation should be qualified. The questions are those which will usually bring out the points necessary to be considered.